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No. 81-1037

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

ISRAEL AND RALEY,

Petitioner,

v.

FUTURONICS CORPORATION,

Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Second Circuit

PETITIONER'S REPLY MEMORANDUM

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

I. THE OPPOSING BRIEFS[1] CONCEDE THE MATERIAL ERRORS IN THE REVIEWS BELOW AND DEFINE THE SIGNIFICANT CONFLICT WITH THE DECISIONS OF THIS COURT AND THE CIRCUIT COURTS.

Futuronics Corporation, in its opposing briefs, does not address the substantial questions presented in the Petition

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[1]Petitioner has received two (2) different opposing briefs from Respondent in the mail; three copies of the first brief on January 13, 1982, and two copies of the second brief on January 21, 1982. Petitioner assumes that the second opposing brief is the result of the failure of the first brief to comply with Supreme Court Rules 33.2(b)(2) and 34.1(a), (b), and (f). However, with uncertainty as to which brief is the opposing brief, this Reply is to both.

concerning due process and the application and interpretation of the Bankruptcy Rules. Apart from the specious argument that the Petition was untimely, the opposing briefs undercut the foundation for the forfeiture substituted by the district judge by acknowledging that the assessment of compensation and sanctions does not depend upon the findings and assessment in another case but is "a factual determination peculiar to the facts of this case" (First Opp. Brf., p. 2, Second Opp. Brf., pp. i & ii). The opposing briefs then undercut the foundation upon which the majority's reiteration of the forfeiture is based by conceding that "Bankruptcy Rule 219(d) does not make it mandatory for the bankruptcy court to deny all compensation" (First Opp. Brief, p. 17, Second Opp. Brf., p.16). If, as stated in the opposing briefs, there was no mandatory penalty involved in this case and the jurisdiction for the determination was vested in the discretion of the Bankruptcy Court based on the facts which are peculiar to this case, then the forfeiture substituted on review clearly may not stand and it is respectfully submitted that a summary disposition by this Court affirming the trier-of-fact may now be in order.

The judicial process of a trial and appellate review is not a gauntlet through which a party must run subject to whatever opinion each judge may choose to render along the way. The trial is to determine the facts and resolve the issues in accordance with the application of proper legal principles; and once the facts have been correctly found they are binding in any subsequent review. The appellate process is to provide a review of and not a substitution for the decision of the trier-of-fact under standards which require that decision to be affirmed unless the findings are clearly erroneous or there has been a material mistake in applying the appropriate law or it is apparent that there

has been a clear abuse of the discretion which is vested in the trier-of-fact.

Here, the trier-of-fact was called upon to assess the compensation due Petitioner for its services in prosecuting contract rights against the United States before a separate forum for a period of four years resulting in the creation of funds and benefits which successfully restored Futuronics Corporation to solvency. The trier-of-fact, who had been involved in the bankruptcy proceedings for a number of years, conducted the trial, heard the evidence and arguments, considered the precedents and the law, and made findings and conclusions which resolved the controversy by tailoring a remedy which compensated Petitioner for its years of dedicated effort, imposed sanctions for prohibited actions he attributed to Petitioner, and prevented a windfall to Futuronics Corporation, which knew of and expressly agreed to the Petitioner's actions. Only after it obtained the fruits of Petitioner's labor did Futuronics urge the denial of compensation to Petitioner because of the employment of and payment for the Arutt firm's contributed services at no charge to and with the knowledge and express agreement of Futuronics. However, based on his findings and conclusions, the trier-of-fact rejected the clearly unconscionable position of Futuronics and decided instead to set aside the compensation specified in the original Order and the retainer and fee agreement and, as urged by the creditors, fixed the compensation due Petitioner under the criteria of Bankruptcy Rule 219(c) subject to a further penalty of $190,000. On review, without considering the validity of the application and interpretation of the Bankruptcy Rules in the trial court's conclusions and while disregarding the findings of the Petitioner's total dedication to the successful pursuit of rights on behalf of Futuronics and the knowledge and con-

sent of the parties involved in the bankruptcy proceeding, a forfeiture of all compensation was substituted for the trial court's assessment as being a mandatory penalty under a decision on wholly distinguishable facts in another case and under a subparagraph of a former law.

The findings of the trier-of-fact have been affirmed twice and they clearly cannot be questioned, as acknowledged in the opposing briefs.[2] Further, as now conceded in the opposing briefs, the assessment was required to be based on these findings and not those in another case and was committed to the discretion of the trier-of-fact and not to the imposition of a mandatory penalty.

A review of the assessment by the trier-of-fact, here, was subject to the standard of whether he properly and adequately exercised his discretion and not whether the reviewing judge would reach the same assessment if he had been vested with the discretion. A review of the decision of the Bankruptcy Court is subject to the standards prescribed in Rule 52(a) of the Federal Rules of Civil Procedure (Bankruptcy Rules 801, 802, 803, 810, Advisory Committee Note to Rule 810). Fee allowances and sanctions are findings based on sound equitable discretion in reconciling competing claims to reach an overall fair resolution and "are not reviewable except where a clear abuse of discretion is apparent." The knowledge and consent of the unharmed beneficiaries "gives the court full discretion to deny" the sanction. [*United States* v. *Gypsum Co.*, 333

[2]However, Futuronics Corporation, in the opposing briefs proceeds to question and ignore findings, particularly the findings of more than 400 hours of professional services contributed by the Arutt firm in helping to create the funds for which services Petitioner paid at no charge to Futuronics; and the knowledge of and express agreement by Mr. Blanck, for Futuronics, to the Petitioner's employment of the Arutt firm.

U.S. 364, 395, 68 S. Ct. 525, 92 L.Ed. 746 (1948); *Katchen* v. *Landy*, 382 U.S. 323, 327, 86 S.Ct. 467, 15 L.Ed. 2d 391 (1966); *Dickinson Industrial Site* v. *Cowan*, 309 U.S. 382, 389, 60 S.Ct. 595, 84 L.Ed. 819 (1940); *Reconstruction Finance Corp.* v. *Denver & Rio Grande West. R. Co.*, 328 U.S. 495, 533, 66 S.Ct. 1282 & 1384, 90 L.Ed. 1400 (1946); *Comstock* v. *Group of Investors*, 335 U.S. 211, 230, 68 S.Ct. 1454, 92 L.Ed. 1911 (1948); *Calton Crescent, Inc.*, 173 F.2d 945, 946 (2nd Cir. 1949), *aff'd sub nom., Manufacturers Trust Co.* v. *Becker*, 338 U.S. 304, 70 S.Ct. 127, 94 L.Ed. 107 (1949)]. The standard, which has been described as "universal" throughout the Circuit Courts, is that the reviewing court will not disturb or interfere with the trial court's assessment of compensation and sanction absent a sustaining of the very heavy burden of showing a "clear or gross abuse of the discretion" committed to the trial court amounting to "a failure to act conscientiously and fairly", an "obvious miscarriage of justice", or a "manifest disregard of right and reason."[3]

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[3]*First Circuit:* See, *In re Dole*, 244 F. Supp. 751, 754, 757-758 (N.D. Me. 1965).

Second Circuit: See, *Arlan's Dept. Stores, Inc.*, 615 F.2d 925, 943 (2nd Cir. 1979); *New York, N.H. & H.R. Co.* v. *Iannotti*, 567 F.2d 166, 179 (2nd Cir. 1977), *cert. den.*, 98 S.Ct. 120 (1977); *Roth* v. *Reich*, 164 F.2d 305, 311 (2nd Cir. 1947); *In re Dunhill Suspender Corp.*, 162 F. Supp. 608, 611 (S.D.N.Y. 1958).

Third Circuit: See, *In re Moran*, 456 F.2d 1030, 1031 (3rd Cir. 1972), *cert. den.*, 409 U.S. 872, 93 S. Ct. 201, 34 L. Ed. 2d 123 (1972); *In re Standard Gas & Electric Co.*, 106 F.2d 215, 216 (3rd Cir., 1939); *Matter of Edinboro Development, Inc.*, 422 F. Supp. 1049, 1051 (W.D. Pa. 1976); *In re Botany Industries, Inc.*, 403 F. Supp. 234, 237 (E.D. Pa. 1975); *In re Garrett Road Corp.*, 256 F. Supp. 709, 714 (E.D. Pa. 1966).

Fourth Circuit: See, *Milbank, Tweed & Hope* v. *McCue*, 111 F.2d 100, 101 (4th Cir. 1940); *Johnson* v. *Carolina Scenic Stages*, 242 F.2d 263, 264 (4th Cir. 1957); *In re Joe Necessary & Son, Inc.*, 475 F. Supp. 610, 613-614 (W.D. Va. 1979).

Here, in substituting the forfeiture, the reviewing judges found no error in the findings of the trier-of-fact, made no additional or conflicting findings showing that the trier-

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Fifth Circuit: See, *Rose Pass Mines, Inc.* v. *Howard,* 615 F.2d 1088, 1091 (5th Cir. 1980); *Matter of Multiponics, Inc.,* 622 F.2d 709, 723 (5th Cir. 1980); *In re Jones,* 490 F.2d 452, 455 (5th Cir. 1974); *In re Bemporad Carpet Mills, Inc.,* 434 F.2d 988, 989 (5th Cir. 1970); *In re Garvin Properties, Inc.,* 411 F.2d 594, 594-595 (5th Cir. 1969).

Sixth Circuit: See, *In re Nelson & Sons, Inc.,* 426 F.2d 235, 236 (6th Cir. 1969) *cert. den.,* 397 U.S. 1038, 90 S. Ct. 1359, 25 L. Ed. 2d 650 (1970); *Gochenour* v. *Cleveland Terminal Bldg. Co.,* 142 F.2d 991, 995 (6th Cir. 1944); *Calhoun* v. *Stratton,* 61 F.2d 302, 303 (6th Cir. 1932).

Seventh Circuit: See *Matter of Land Investors, Inc.,* 544 F.2d 925, 933 (7th Cir. 1976); *Stolkin* v. *Nachman,* 472 F.2d 222, 228 (7th Cir. 1973); *In re Midwest Engineering and Equipment Co.,* 440 F.2d 326, 328-329 (7th Cir. 1971); *In re Webcor, Inc.,* 392 F.2d 893, 898-899 (7th Cir. 1968); *In re Schumaker Construction, Inc.,* 346 F.2d 353, 355 (7th Cir. 1965); *In re West Counties Const. Co.,* 182 F.2d 409, 411 (7th Cir. 1950); *In re 32-36 North State St. Bldg. Corp.,* 164 F.2d 205, 206 (7th Cir. 1947); *In re Hamilton Distributors, Inc.,* 440 F.2d 1178, 1180 (7th Cir. 1971).

Eighth Circuit: See *Matter of Urban America Development Co.,* 564 F.2d 808, 809 (8th Cir. 1977); *In re Colonial Services Co.,* 480 F.2d 747, 748 (8th Cir. 1973); *Tracy* v. *Spitzer Rorick Trust & Savings Bank,* 12 F.2d 755, 756-757 (8th Cir. 1926); *Matter of Dawson,* 446 F.Supp. 196, 198-199 (E.D. Mo. 1978); *In re American Range & Foundry Co.,* 41 F.2d 845, 847-848 (D. Minn. 1926).

Ninth Circuit: See *Time Oil Co.* v. *Wolverton,* 491 F.2d 361, 365 (9th Cir. 1974), *cert. den.,* 417 U.S. 947, 94 S. Ct. 3072, 41 L. Ed. 2d 667 (1974), *Bank* v. *Blum,* 460 F.2d 197, 200 (9th Cir. 1972); *Levitt* v. *Robinson,* 402 F.2d 753, 755 (9th Cir. 1968); *Miller* v. *Robinson,* 378 F.2d 2, 3 (9th Cir. 1967); *Dee* v. *United Exchange Bldg.,* 88 F.2d 372, 375 (9th Cir. 1937); *In re Barceloux,* 74 F.2d 289, 294 (9th Cir. 1934).

Tenth Circuit: See *In re McGinnis,* 586 F.2d 162, 164 (10th Cir. 1978); *In the Matter of Vickers,* 577 F.2d 683, 687 (10th Cir. 1978);

of-fact had not properly and adequately supported the exercise of his discretion, and did not consider the conclusions of improper reliance and a prohibited act under the trial court's application and interpretation of Bankruptcy Rule 219(a) and Bankruptcy Rule 219(d). Rather, on review, the assessment by the trier-of-fact was rendered little more than a superfluous advisory opinion with the district judge interjecting his own opinion that a forfeiture was required by a decision in a wholly distinguishable case while conceding that "some may disagree" with his opinion; and the majority below reiterated the forfeiture as a mandatory penalty.

Futuronics argues deception and evil intent, yet where was the deception or evil intent when Petitioner required the Court's approval prior to the execution of the retainer and fee agreements and received in the mail the Order and the retainer and fee agreement executed by the Arutt firm and by Mr. Blanck; or when Petitioner devoted essentially four years of its professional life to fighting for rights and interests on behalf of Futuronics; or when Petitioner paid the Arutt firm for its contributed services in helping to create the funds at no charge to Futuronics; or when Petitioner immediately filed a full Rule 219 statement of services at the first suggestion that such a statement was needed; or when the parties involved in the the bankruptcy proceeding maintained a dead silence until after the successful end of litigation and the receipt of the funds and benefits created by Petitioner's labor? Petitioner has never questioned the fact that, until Petitioner's statement of

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Behringer v. *Lybrand & Morgan*, 270 F.2d 670, 675 (10th Cir. 1959); *King* v. *Baer*, 482 F.2d 552, 557-558 (10th Cir. 1973), *cert. den.*, 414 U.S. 1068, 94 S. Ct. 577, 38 L. Ed. 2d 473 (1973); *Matter of Mullendore*, 527 F.2d 1031, 1038 (10th Cir. 1975); *Sullivan & Cromwell* v. *Colorado Fuel & Iron Co.*, 96 F.2d 219, 222 (10th Cir. 1938); *In re Williamson*, 431 F. Supp. 1023, 1029 (W.D. Okla. 1976).

services, the court was not and should have been informed of the employment of the Arutt firm, but this does not create illicit fee splitting in Petitioner's reliance on the unaltered Order and the executed retainer and fee agreement and the Petitioner's employment of and payment for the Arutt firm's contributed services at its own expense and with the express consent of the client nor does it render proper the substitution of a forfeiture on review as a mandatory penalty in lieu of the assessment by the trial court in the exercise of its equitable discretion on the entire findings in this case.

While conceding the errors in the reviews below, the opposing briefs present a distorted and incomplete version of the findings and asserts that the errors do not matter because the substitution of the forfeiture for the assessment by the trier-of-fact is not important and is not in conflict with the decisions of this Court and the Circuit Courts. However, the substituted forfeiture based on the erroneous standards of wholly distinguishable facts in another case and a mandatory penalty constitute a clear and direct departure from and conflict with the required standards for a review of the exercise of the discretion which is committed to the trier-of-fact in bankruptcy. These standards have been established by the decisions and Rules of this Court and had been consistently applied by the Circuit Courts. Apart from the failure to address the substantial questions which are presented in the Petition and the clearly unconscionable result, the erroneous reviews below may not stand as a precedent for the reviewing judge to usurp the discretion which is committed to the trier-of-fact under the law.

II. THE PETITION FOR A WRIT OF CERTIORARI WAS CLEARLY FILED WITHIN THE REQUIRED TIME

Respondent's argument that the Petition was untimely is based on the same type of incomplete and distorted reasoning which characterizes its entire position that Petitioner should receive no compensation for its dedication of four years to the successful pursuit of rights on behalf of Respondent. Although recognizing that Title 28, United States Code Section 2101(c) governs the "time within which a petition for writ of certiorari may be filed", the Respondent ignores the words, "entry of", in the Statute and argues that the words, "the date of the denial of rehearing", in Supreme Court Rule 20.4 means that the filing period starts on the date an opinion is signed rather than the date such opinion is entered and served on the parties. This argument ignores its clearly anomalous result. An opinion denying a rehearing could be signed and dated but, because of second thoughts, further consideration or any other reason, remain in chambers for twenty, fifty, or even ninety days (here, twenty-eight days), and then be entered or filed and distributed to the parties. Respondent argues that the time from signing the opinion to its entry should thus reduce the statutory period for or even bar the filing of an appeal or petition to this Court without the parties even knowing, until it is too late, that the rehearing had been denied.

As recognized in the opposing briefs, the start of the ninety day period under 28 U.S.C. § 2101(c) is that point in time at which the lower court has fully and finally disposed of the rights of the parties and a timely petition for rehearing suspends that disposition until the final disposition of the petition itself [*Citizens Bank of Michigan City* v. *Opperman,* 249 U.S. 448, 450 (1919); *Supreme Court Practice,* Stern and Gressman, 5th ed., at

399 (1978)]. However, the opposing brief does not address the elements which establish that final disposition.

The question of when a final disposition occurs involves considerations of both the event itself and notice to the parties; and this question has long been settled by the decisions of this Court. The rights of parties in respect to the timeliness of proceeding to the Supreme Court "are determined by the date of *actual entry,* or of the signing *and filing* of the final decree." [*Providence Rubber Co.* v. *Goodyear,* 73 U.S. 153, 156, 18 L.Ed. 762, 763 (1868); Emphasis supplied]. Even if there is notice of an opinion, there must be notice of the entry of the final disposition of the case to start the ninety day filing period [*Scofield* v. *N.L.R.B.,* 394 U.S. 423, 427, 22 L.Ed. 2d 285, 89 S.Ct. 1154, 1156-57 (1969)]. [Cf., *Puget Sound Power & Light Co.* v. *County of King,* 264 U.S. 22, 681 L.Ed. 541, 44 S.Ct. 261 (1924); *United States* v. *Seminole Nation,* 299 U.S. 417, 81 L.Ed. 316, 57 S.Ct. 283 (1937); *Marquette Nat. Bank* v. *First of Omaha Service Corp.,* 439 U.S. 297, 307, n.18, 58 L.Ed. 2d 534, 99 S.Ct. 54 (1978)].

Here, while the majority opinion and dissenting opinion of the panel denying rehearing was signed on August 7, 1981, it was neither entered nor filed until September 4, 1981, with the denial of the suggestion for rehearing en banc, and the parties were thereafter served with this final disposition of the action in the Second Circuit (Petition, Appendix 2a and 77a). Respondent's opposing briefs admit that the Petition was filed within ninety days of the entry, or of the signing AND filing of this final disposition

and receipt of notice. Accordingly, the Petition was timely under 28 U.S.C. § 2101(c) and the Rules and decisions of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of January, 1982, three copies of this Reply Memorandum were mailed, first class postage prepaid, to Gary L. Blum, Esq., 425 Park Avenue, New York, New York 10022, Counsel for Futuronics Corporation, Respondent. I further certify that all parties required to be served have been served.

Mortimor S. Gordon
Counsel for Petitioner